



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 353 OF 2017

[FORMERLY NAIROBI HCCC NO. 196 OF 2007]

RODGERS KATAMI WAMBIA.....1ST PLAINTIFF

ALEX KIMIYA.....2ND PLAINTIFF

JONATHAN OMBEMBA OMBIMA.....3RD PLAINTIFF

[As officials of Lugari Yearly Meeting of Friends (Quakers)]

VERSUS

RACHEL ODERA.....1ST DEFENDANT

FELIX ODERA.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

AND

BOARD OF MANAGEMENT –

MARULA PRIMARY SCHOOL.....INTERESTED PARTY

RULING

[NOTICE OF MOTION UNDER CERTIFICATE OF URGENCY DATED 19TH OCTOBER, 2020]

1. The Plaintiffs moved the Court through the above application, seeking to have the ruling delivered on 14th October, 2020 reviewed/varied to read inter alia that the 1st and 2nd Defendants' activities be confined to the portion of the suit land where the 2nd Defendant has constructed a residential house and that the Plaintiffs and the Interested Party be at liberty to utilize the rest of the suit property; that the 1st and 2nd Defendants shall not carry out any further developments or activities on the said portion of land described above that alters or likely to alter it permanently; that an inhibition be issued against all dealings in the form of transfer charge, subdivision of the land **Kakamega/Lugari/183** until the hearing and determination of **Eldoret Court of Appeal Civil Appeal No. 20 of 2020**, and that the 1st and 2nd Defendants be restrained from utilizing land parcel Kakamega/Lugari/182 until the hearing and determination of **Eldoret Court of Appeal Civil Appeal No. 20 of 2020**. The Plaintiffs also prays for costs. The application is based on the eight (8) grounds on its face and is supported by the affidavit sworn by **Rodgers Katami Wambia**, the 1st Plaintiff, on the 19th October, 2020.

2. The application is supported by the 3rd Defendant and Interested Party through the affidavit sworn by **Richard Malala** on the 17th November, 2020.

3. The 1st and 2nd Defendants opposed the Plaintiffs' application through the replying affidavit sworn by **Rachel Odera**, the 1st Defendant, on the 23rd November, 2020 and grounds of opposition of the same date.

4. The learned Counsel for the Plaintiffs, 3rd Defendant and Interested Party, and the 1st and 2nd defendants filed their submissions dated the 5th November 2020, 17th November 2020 and 23rd November, 2020 respectively.

5. The following are the issues for the Court's determinations;

(a) Whether the Plaintiffs have met the threshold in Order 45 Rule 1 of the Civil Procedure Rules for review or varying of the ruling of 14th October, 2020 in the terms prayed.

(b) Who pays the costs of the application?

6. The Court has carefully considered the grounds on the application, the affidavit evidence, grounds of opposition, the record, submissions by the learned Counsel, the superior courts' decisions cited therein and come to the following findings;

(a) That as can be discerned from the provisions of the law cited on the Notice of Motion and prayers 2 to 4 thereof, the applicable law is **Section 80 of the Civil Procedure Act** and **Order 45 Rule 1 of the Civil Procedure Rules** that provide for review. That the said provisions as affirmed by the superior courts' decisions cited by the learned Counsel clearly require an applicant desiring to have the court exercise its discretion in their favour, to establish to the satisfaction of the Court that –

(i) New and important matter or evidence exists that after the exercise of due diligence was not in their knowledge, or could not be availed when the Order sought to be reviewed was made.

(ii) Some mistake or error apparent on the face of the record exists, or

(iii) Other sufficient reason.

That the application for review should be made without unreasonable delay. That in the instant application that was filed on the 21st October, 2020 which was about seven (7) days after the ruling sought to be reviewed, the Court finds that it was filed without unreasonable delay.

(b) That the record confirms that after the judgment of 13th May 2020, the only party or parties that have so far signaled their intention to appeal are the 1st and 2nd Defendants. The two have since filed **Eldoret CACA No. 20 of 2020** that is pending. That as can be seen from the orders at paragraph **12(a), (b)(i) to (vi)**, of the judgment, the Court gave orders relating to both land parcels Kakamega/Lugari/183 and 182. That subsequent to the delivery of the judgment, the only party/parties who moved this court were the 1st and 2nd Defendants vide the Notice of Motion dated the 27th May, 2020 seeking for stay of execution of the judgment delivered on 13th May, 2020 pending the hearing and determination of the intended appeal. The application was heard on merit and a ruling thereof delivered on the 14th October, 2020. That the Court has perused the Notice of Motion subject matter of the ruling dated the 14th October, 2020 and the documents filed in opposition thereof, and is of the same view that it had when delivering the said ruling. That there was no application filed by the Plaintiffs, 3rd Defendant and the Interested Party that was to be heard alongside that by the 1st and 2nd Defendants for their prayers to have been considered in the ruling of 14th October, 2020. That the Court made a determination on the application dated the 27th May, 2020 after considering the grounds, affidavit evidence and the submissions presented before it then. There was no prayer for inhibition over the suit land Kakamega/Lugari/183 or restraining order in respect of land parcel Kakamega/Lugari/182, and the Court could not pronounce itself on issues or matters that were not before it for determination.

(c) That the Plaintiffs, the 3rd Defendant and Interested Party appear convinced that the orders granted by the Court through the ruling delivered on the 14th October, 2020 should have been different. That the Plaintiffs have gone ahead to set out the kind of orders that in their view would have done justice to the parties. That unfortunately, the ruling of the 14th October, 2020 was about the 1st and 2nd Defendants' application dated the 27th May, 2020 especially prayer 3 thereof. That prayer was granted through the said ruling under **order 7(a)** on the conditions set out under **order 7(b)(i) to (iii)**. That the court therefore finds no apparent errors on the face of the ruling delivered on 14th October, 2020 that calls for review by the Court. That what the Plaintiffs appear to be saying through the current application is that they are dissatisfied with the said Court's ruling. That as this Court is now *functus officio*, and the arena of litigation in this matter has sifted to the Court of Appeal, any party not satisfied with the ruling of 14th October, 2020 or the judgment of the court delivered on 13th May, 2020 should move the appellate court as appropriate.

(d) That there being no error or mistake apparent on the face of the ruling, and no new or important matter of evidence having been established or any other sufficient cause to warrant a review having been set out, the Plaintiffs' Notice of Motion dated the 19th October, 2020 and filed on the 21st October, 2020 has no merit. The costs of the application should abide the outcome of the pending appeal.

7. That in view of the foregoing, the Plaintiffs' Notice of Motion dated the 19th October, 2020 is without merit and is dismissed with costs to abide the outcome of the appeal. It is so ordered.

Delivered virtually and dated at Eldoret this 23rd day of December, 2020.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiffs: Absent.

Defendants: Absent.

Interested Party: Absent.

Counsel: Mr. Midikira for the Plaintiffs.

M/s Muriithi for 1st and 2nd Defendants.

Mr. Kuria for the 3rd Defendant and Interested Party.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.